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No. 88-325

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
RESPONDENTS

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether this Court's decision in *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829 (1987), which held that flat highway taxes violate the nondiscrimination principle of the Commerce Clause, should be applied retroactively to require refunds of the unconstitutionally exacted tax payments.

2. Whether, even if the decision in *Scheiner* is not retroactive, Arkansas was entitled to retain unconstitutional highway taxes for a tax year that did not begin until after *Scheiner* was decided.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Petitioners are certified plaintiff classes consisting of all motor carriers whose vehicles were "subject to the Highway Use Equalization Tax embodied in Act 685 of 1983," including the following named plaintiffs:

Petitioner American Trucking Associations, Inc. (ATA), is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Arkansas Motor Carriers Association, Inc., formerly the Arkansas Bus & Truck Association, Inc., is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Leon Cawood is a sole proprietor doing business as Leon Cawood Trucking.

Petitioner Commercial Carriers, Inc. is a wholly owned subsidiary of Ryder Commercial Transport, Inc., which in turn is a wholly owned subsidiary of Ryder System, Inc. Commercial Carriers' affiliates or subsidiaries (other than wholly owned subsidiaries) are Automotive Rail-handling, Inc.; B & C, Inc.; Blazer Truck Lines, Inc.; Carrier Support, Inc.; Complete Auto Transit, Inc.; Delevan Industries, Inc.; F. J. Boutell Driveaway Co., Inc.; Fleet Carrier Corporation; Fleet Carrier Dealer Services, Inc.; Janesville Auto Transportation Company; M & G Convoy, Inc.; Murray Sandblast & Paint, Inc.; National Trucking Company; Ryder Energy Distribution Corporation; Ryder Truck Rental, Inc.; Summit Industries, Inc.; and Transport Support, Inc.

Petitioner Diamond Transportation System, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly owned subsidiaries) are Fox Transportation, Inc.; Sed. Air, Inc.; and Snicknej Co.

Petitioner Joe Fortenberry is a sole proprietor doing business as Fernwood Transportation.

Petitioner Jones Truck Lines, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of JTL Holding Company.

Petitioner Rollins Leasing Corporation is a wholly owned subsidiary of R.L.C. Corporation. Rollins' affiliates or subsidiaries (other than wholly owned subsidiaries) are Rollins Dedicated Carriage Services, Inc., and Rollins-Matlack Administrative Services, Inc.

Petitioner Transcon Lines, which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Transcon, Inc.

Respondents are the following defendant state officials, or their successors: Maurice Smith, Director, Arkansa. Highway and Transportation Department (Mr. Smith's predecessor in office, Henry C. Gray, was the lead defendant in the earlier proceedings in this case); Dalton Farmer, Ron Harrod, Patsy Lee Thomasson, Robert Pritchett, Jr., and Bobby Hopper, members of the Arkansas State Highway Commission; John Bailey, Chief of the Arkansas Highway Police Division of the Arkansas Highway and Transportation Department; Charles D. Ragland, Commissioner of Revenues, Revenue Division, Arkansas Department of Finance and Administration; Jimmie Lou Fischer, Treasurer of the State of Arkansas; and Mahlon Martin, Director, Arkansas Department of Finance and Administration. Intervenor-defendants O.K. Enterprises, Inc., Peterson Industries, Inc., and Pilgrim's Pride Corporation, doing business collectively as the Arkansas Poultry Federation, are additional respondents.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (Pet. App. 1a-5a) is reported at 746 S.W.2d 377. The opinion of Justice Blackmun in his capacity as Circuit Justice with respect to interim injunctive relief (Pet. App. 9a-13a) is reported at 108 S.Ct. 2. The orders of the Supreme Court of Arkansas denying rehearing (Pet. App. 7a-8a), denying interim relief (*id.* at 14a), and denying a remand to Chancery Court for in-

terim relief (*id.* at 15a) are unreported. The order of this Court remanding the prior appeal to the Supreme Court of Arkansas (*id.* at 16a) is reported at 107 S.Ct. 3252.

JURISDICTION

The judgment of the Supreme Court of Arkansas was rendered on March 14, 1988, and a timely petition for rehearing was denied on April 25, 1988 (Pet. App. 7a). On July 20, 1988, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including August 23, 1988, and the petition was filed on that date. The petition was granted on November 14, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATEMENT

1. On June 23, 1987, this Court struck down two Pennsylvania flat highway use taxes as violative of the Commerce Clause of the United States Constitution. *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829. This case concerns the retroactive and prospective effect of the decision in *Scheiner* on an Arkansas tax materially indistinguishable from one of the invalid Pennsylvania taxes.

The Arkansas Highway Use Equalization (HUE) Tax, Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (Supp. 1985), enacted in 1983 and repealed in October 1987, required heavy trucks operating on Arkansas' highways to pay either an annual flat tax of $175 or a tax of 5¢ per mile traveled in Arkansas. The proceeds of this user fee were dedicated to maintenance of the State's highways.[1]

[1] Prior to 1983, while most states allowed trucks to operate at a weight of 80,000 pounds, Arkansas had enforced a lower 73,280-pound limit. This made it a "barrier" state and seriously impeded the flow of interstate commerce. In 1983, the State increased the legal weight limit to 80,000 pounds and imposed the HUE tax on these heavier trucks. The State's decision to increase truck weight limits was motivated not by the desire to facilitate interstate commerce but rather by the fear that its lower limit would result in a complete loss of federal highway monies. See Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 133(a), 96 Stat. 2123 (1983) (codified as amended at 23 U.S.C. § 127).

Under this scheme, Arkansas effectively taxed only the first 3,500 miles of annual highway use by a given vehicle—that being the point at which it became advantageous to pay the flat $175 rate. Any further highway use, though obviously causing additional highway wear and tear, was free of tax. The result of this tax structure was that frequent users of the State's highways paid a substantially lower tax per mile of operations than did less frequent users. Because vehicles based in Arkansas were likely to log many more miles within the State than vehicles based elsewhere, the tax produced a substantial discrimination against interstate commerce in terms of per-mile costs, as the court below acknowledged (Pet. App. 2a).

2. In 1983, even before the HUE tax became effective, petitioners instituted this class action challenging the tax on the ground that it impermissibly discriminated against interstate commerce in violation of the Commerce Clause. Petitioners promptly sought preliminary injunctive relief, which was denied by the Arkansas courts (see Pet. App. 39a-41a). Thereafter, the Chancery Court of Pulaski County upheld the tax, and a divided Arkansas Supreme Court affirmed (*id.* at 17a-35a, 36a-38a). An appeal was taken to this Court under 28 U.S.C. § 1257(2). The Court held that appeal (No. 87-358) pending its decision in the simultaneously filed appeal in *Scheiner* (No. 87-357), which involved an identical constitutional challenge to Pennsylvania's two flat highway use taxes.

On June 23, 1987, this Court ruled that the Pennsylvania taxes violated the Commerce Clause because their measure was not proportionate to the extent of highway

use. It noted that the "inevitable effect [of unapportioned flat taxes] is to threaten the free movement of commerce" (107 S.Ct. at 2840), that the Pennsylvania taxes failed the "internal consistency" test for determining the validity of state taxes challenged under the Commerce Clause (*ibid.*), and that "the taxes are plainly discriminatory" because "[i]n practical effect * * * they impose a cost per mile on [out-of-state] trucks that is [many times] as heavy as the cost per mile borne by local trucks" (*id.* at 2841).

On June 26, 1987, the Court vacated the judgment of the Arkansas Supreme Court in this case and remanded for further consideration in light of *Scheiner*. 107 S.Ct. 3252 (Pet. App. 16a). Petitioners immediately inquired of Arkansas officials whether they intended to continue to enforce the HUE tax during the pendency of the remand proceedings and were advised that they did. In addition, the State refused to allow the tax to be paid under protest and declared that, even if the HUE tax were to be held unconstitutional, it intended to assert a defense of sovereign immunity as a complete bar to any refunds. Pet. App. 12a. In light of the State's position, petitioners moved for immediate issuance of this Court's mandate in order to expedite their attempt to obtain injunctive relief against the HUE tax once the case returned to the Arkansas state courts. Over the State's opposition, Justice Blackmun granted petitioners' motion, and the mandate issued on July 16, 1987 (see Pet. App. 10a).

3. That same day, with the Arkansas Supreme Court soon to recess for the summer, petitioners moved in that court for a remand to the Chancery Court so that they could seek a preliminary injunction either to bar further collection of the HUE tax or to order an escrow of the taxes to be collected. In this application petitioners noted that the failure to act expeditiously would result in the collection of large sums of plainly unconstitutional taxes,

which the State had indicated it would under no circumstances refund. Notwithstanding the court's impending recess and the fact that July and August were peak months for the payment of HUE taxes (see pages 41-42 & n.27, *infra*), the State opposed the motion for a remand, and the Arkansas Supreme Court denied it on July 20, 1987 (Pet. App. 15a).

In light of that action, petitioners asked, on July 24, 1988, that the Arkansas Supreme Court itself grant injunctive relief in the form of an order requiring HUE tax payments to be escrowed pending a ruling on the constitutionality of the HUE tax. In support of the application, petitioners argued that the HUE tax was indistinguishable from the Pennsylvania axle tax invalidated in *Scheiner*. Petitioners further explained that out-of-state truckers operating in Arkansas risked irreparable injury in the absence of temporary equitable relief: if the truckers refused to pay the HUE tax pending a determination of its constitutionality, they would be barred from using the State's highways and would suffer devastating economic losses; if, on the other hand, they paid the HUE tax, there was a substantial risk, given the State's announced intent to assert sovereign immunity and its refusal to accept HUE tax payments made under protest, that they would be denied refunds once the tax was declared unconstitutional.

4. On July 30, 1987, the Arkansas Supreme Court entered an order (without opinion) denying petitioners' application for temporary relief (Pet. App. 14a). Petitioners thereupon immediately sought emergency injunctive relief from this Court. On August 14, 1987, Justice Blackmun, in his capacity as Circuit Justice, granted petitioners' application and ordered that all further HUE tax payments be placed in escrow pending completion of the litigation. 108 S.Ct. 2 (Pet. App. 13a). Justice

Blackmun found that the HUE tax "works to deter interstate commerce" in a manner "substantially similar to that of the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*" and that "ATA is likely to succeed on the merits of its challenge to the Arkansas HUE tax" (*id.* at 11a). Justice Blackmun further concluded that there was a risk of irreparable injury to the carriers represented by ATA, in light of the State's refusal to accept HUE tax payments made under protest and its planned assertion of sovereign immunity as a ground for refusing refunds (*id.* at 12a).

5. In an opinion issued on March 14, 1988 (Pet. App. 1a-6a), the Arkansas Supreme Court decided the remand proceedings. It made short shrift of the question of the constitutionality of the HUE tax under *Scheiner*. Noting that "[i]t is conceded that the HUE tax effectively costs other truckers more per mile than it costs those based in Arkansas" (*id.* at 2a), the court struck down the statute, stating that it had "little doubt that the Supreme Court would hold that the HUE tax is unconstitutional" (*id.* at 3a).

Despite this conclusion that petitioners had been forced to pay an unconstitutional tax, the Arkansas Supreme Court denied refunds, holding that this Court's decision in *Scheiner* should not be applied retroactively under the test of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). The court concluded that the State had been justified in relying on this Court's old *Aero Mayflower* line of cases [2] in adopting and enforcing the flat HUE tax, that the Commerce Clause free trade policies that required the

[2] *Aero Mayflower Trans. Co.* v. *Georgia Pub. Serv. Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Trans. Co.* v. *R.R. Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950).

result in *Scheiner* would be fully served by prospective application of that ruling, and that retroactive application of the new rule would be inequitable because the unconstitutionally exacted tax revenues had already been expended and a full refund would exceed a fair recovery for the discrimination petitioners suffered. Pet. App. 4a-5a.[3]

In addition, despite its acknowledgment that the HUE tax was plainly unconstitutional under *Scheiner*, the Arkansas Supreme Court permitted the State to retain most of the monies collected for the right to operate on the State's highways during the July 1, 1987-June 30, 1988 tax year. Although that tax year did not even *begin* until after *Scheiner* had been decided, the court ordered refunds only of amounts collected after August 14 and placed in escrow under the compulsion of Justice Blackmun's order. It explained, inconsistently with its recognition of the controlling effect of *Scheiner*, that it was not until Justice Blackmun's escrow order that the State was "put on notice that the ATA's claims [of unconstitutionality] * * * were likely to succeed on their merits" (Pet. App. 5a). The court also observed (*ibid.*) that the escrowed funds had not been spent or, presumably, counted on for the future. Justice Hickman dissented from this part of the court's ruling, explaining that it erroneously failed to give full prospective effect to *Scheiner* (*id.* at 6a).

[3] The court did not explain why the latter observation made it equitable to refuse a refund of even the discriminatory portion of the tax. This point was stressed in ATA's rehearing petition to the Arkansas Supreme Court (at 4-8), which was denied without opinion.

SUMMARY OF ARGUMENT

In *American Trucking Associations, Inc.* v. *Scheiner*, 107 S.Ct. 2829 (1987), this Court held that flat highway taxes violate the Commerce Clause because they discriminate against highway users operating in interstate commerce. In light of *Scheiner*, it is uncontested that Arkansas violated petitioners' constitutional rights when it imposed the HUE tax in 1983. The Arkansas Supreme Court nonetheless held that the State was not required to remedy this constitutional violation by refunding the illegal exacations. Relying on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the court below concluded that it would be unfair to the State to apply *Scheiner* "retroactively" to the tax refund proceedings and held that refunds would be required only of taxes paid after Justice Blackmun ordered creation of the escrow. The Arkansas Supreme Court's analysis is plainly wrong.

I.

A. The threshold requirement for nonretroactivity under *Chevron* is that the decision "establish a new principle of law" by "overruling clear past precedent on which litigants may have relied" (*Chevron*, 404 U.S. at 106). Only if the decision "announce[s] an entirely new and unanticipated principle of law" (*United States v. Johnson*, 457 U.S. 537, 551 (1982)), so that application of the new rule would upset legitimate and firmly established reliance interests, would it be appropriate for a court to ignore the new—and correct—legal rule in deciding a case.

Arkansas cannot satisfy that requirement, because this Court's decision in *Scheiner* did not announce any new principle of Commerce Clause jurisprudence. Instead, *Scheiner* merely applied settled principles governing state taxation of interstate commerce first articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977),

and reiterated in a number of cases decided prior to passage of the HUE tax. The Court expressly noted in *Scheiner* that flat highway taxes are "unquestionably discriminatory" (107 S.Ct. at 2847) and that they violate the Commerce Clause "[u]nder our consistent course of decisions in recent years" (*id.* at 2841).

This conclusion is not affected by the existence of the *Aero Mayflower* line of cases, which had upheld flat highway taxes nearly half a century earlier. Although the State in *Scheiner* had "talismanically" invoked the *Aero Mayflower* decisions to defend its flat taxes (107 S.Ct. at 2833), the Court quickly disposed of those decisions as relics of the pre-*Complete Auto* era resting on Commerce Clause principles that "our more recent decisions * * * have rejected" (*id.* at 2846). Accordingly, the Court noted, when *Complete Auto* eroded those archaic principles, "we necessarily called into question the future vitality of" the *Aero Mayflower* cases. *Ibid.*

In enacting the HUE tax in 1983, therefore, Arkansas could not justifiably have relied on *Aero Mayflower* and could have had no reasonable assurance that flat highway taxes were constitutional. In these circumstances, absolving the State of its obligation to refund the illegal taxes would be wholly at odds with this Court's refusal in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), to allow governmental entities to assert a "good faith" defense to damages liability in constitutional cases.

B. Retroactive application of *Scheiner* would further the purposes behind the Commerce Clause rule announced in that case. By requiring refunds of the discriminatory taxes imposed on out-of-state truckers, it would rectify the competitive benefit granted in-state truckers and thus would help to return interstate commerce to "a plane of equality with local trade in local taxation." *Nippert* v. *City of Richmond*, 327 U.S. 416, 434 (1946). Equally significant, refunds would dampen the natural

incentive of state legislators to discriminate against interstate commerce. As recent experience has demonstrated, states often are motivated to enact constitutionally questionable taxes that favor in-state over out-of-state interests. These statutes are likely to proliferate if legislators know that such preferences would be not only politically advantageous but economically cost-free.

C. The balance of equities also strongly favors the retroactivity of *Scheiner*. Arkansas is simply being required to return taxes that it unconstitutionally collected. Particularly given the weakness of the State's reliance interests in imposing the HUE tax, that can hardly be considered a "substantial inequitable result[]" (*Chevron*, 404 U.S. at 107). Although the Arkansas Supreme Court apparently believed that refunds would impose a burden on the state highway system, it never considered any of the means suggested by petitioners—such as spreading repayment over a period of years or use of bonds—to ameliorate that burden. Indeed, because the payments can be funded by new, nondiscriminatory highway taxes, the State would merely serve as a conduit for rectifying the past discrimination.

It is immaterial to this inquiry that petitioners enjoyed the use of the State's highways during the period of the tax. The objection is not that petitioners were taxed—and, of course, they paid numerous other Arkansas highway taxes during the same period—but that they were discriminated against and thereby required to pay far more than their fair share. Surely, the Arkansas Supreme Court's concern that petitioners not receive an *excessive* refund, because of their past use of the highways, fails to explain why they should receive *no* refund at all.

II.

Even if *Scheiner* is not retroactive, there can be no justification for the Arkansas Supreme Court's further ruling that this Court's decision became effective in

Arkansas not when it was announced but rather when Justice Blackmun entered the interim escrow order nearly two months later. Since the invalidity of the HUE tax was apparent once *Scheiner* was decided, this part of the holding below amounts to nothing less than a refusal to give full *prospective* effect to *Scheiner* by allowing the State to continue to enforce a plainly unconstitutional flat highway tax. This result is all the more unjustified because it rewards Arkansas for its dilatory and obstructive tactics in refusing to recognize the controlling force of *Scheiner* and in delaying the adjudication of the constitutionality of the HUE tax following the remand from this Court. Accordingly, taxes collected for highway use during the post-*Scheiner* tax year, whether remitted before or after the decision was handed down, are subject to refund.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO RECOVER THE TAXES THAT *SCHEINER* HELD TO VIOLATE THE COMMERCE CLAUSE

It is a general principle of long standing that the rule of law announced by a judicial decision normally has retroactive effect. See, *e.g.*, *Saint Francis College* v. *Al-Khazraji*, 107 S.Ct. 2022, 2025 (1987); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). "[T]he general rule of retroactivity" (*Robinson* v. *Neil*, 409 U.S. 505, 507-508 (1973)) is well established, and "[t]he principle that * * * judicial decisions operate retrospectively * * * is familiar to every law student." *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982).

In a narrow range of circumstances, however, this Court has held that some decisions establishing "new" legal principles should not be applied retroactively to later cases in which the operative facts arose before the date of the decision setting forth the new rule. See

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971).[4] We submit that this exception was never intended to cover the situation where a finding of retroactivity would require the government merely to pay monetary compensation to the victim of its unconstitutional conduct. That is particularly true where, as here, the remedy amounts to nothing more than restitution of the government's ill-gotten gains. "[W]here the plaintiffs seek * * * the refund of money that the state has unconstitutionally taken from them," the state "is only being asked to pay back money which the plaintiff claims it had no right to collect in the first place." Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations.* 69 Calif. L. Rev. 189, 309-310 (1981).[5]

Indeed, the Court has followed this approach in a situation essentially indistinguishable from the present case. In *Owen* v. *City of Independence*, 445 U.S. 622 (1980), a plaintiff injured as a result of the city's unconstitutional conduct sought compensatory damages un-

[4] The courts "construe this exception to retroactivity narrowly" (*Lund* v. *Shearson/Lehman/American Express, Inc.*, 852 F.2d 182, 184 (6th Cir. 1988)), limiting nonretroactivity to "exceptional cases" (*In re Disclosure of Grand Jury Material*, 821 F.2d 1290, 1293 n.3 (7th Cir. 1987)) and applying a "presumption * * * strongly in favor of retroactive application." *EEOC* v. *Vucitech*, 842 F.2d 936, 941-942 (7th Cir. 1988).

[5] The Court's *Chevron* decisions generally involve the retroactivity of statutory or procedural rulings in the context of civil litigation between private parties. In that context, the governing rules are essentially neutral in allocating the risk of loss, associated with a change in law, between the plaintiff and defendant. But the governing rules are not neutral in a case such as this. In the criminal area, where the relative interests of the litigants also are not evenly balanced, the Court has declined to apply the *Chevron* test. Instead, it has held that rules announced in criminal cases must be given retroactive effect even when they constitute a "clear break" with the past. See *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987).

der 42 U.S.C. § 1983. The court of appeals held that the city had violated the plaintiff's rights under the Fourteenth Amendment but that it was entitled to qualified immunity from damages liability because its officials acted in good faith. *Id.* at 633. This Court reversed. The Court noted "[h]ow 'uniquely amiss' it would be * * * if the government itself * * * were permitted to disavow liability for the injury it has begotten" and how unfair it would be if "many victims of municipal malfeasance would be left remediless" (*id.* at 651). As the Court observed, "[i]t hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. * * * Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Id.* at 654. Moreover (*id.* at 655),

> even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Thus, whatever the result might be where imposition of a newly-recognized legal rule would "visit substantial injustice and hardship upon" blameless private litigants (*Northern Pipeline Constr.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982)), there should be great reluctance to employ the *Chevron* test as a means of absolving the *government* from having to pay a *monetary award* designed simply to *compensate* a plaintiff for injuries suffered as a result of the violation of his *constitutional* rights. Whether the government "reasonabl[y] * * * conducted itself" (Pet. App. 3a) or not, the fact remains that its conduct violated the Constitution and caused demonstrable financial damage. *Chevron* speaks poorly if at all to that situation.

In any event, even if *Chevron* provides the applicable standard in this case, the Arkansas Supreme Court erred in holding that the State satisfied its stringent requirements for nonretroactivity. The Court in *Chevron* stated the test as follows (404 U.S. at 106-107 (citations omitted)):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

We turn now to an application of this test.

A. The Ruling In *Scheiner* Did Not Constitute An Unforeseeable Break With Clear Past Precedent

1. *The threshold* Chevron *standard requires an unexpected and unforeseeable change in the law*

For a decision to have prospective-only effect, it first "must establish a new principle of law" (*Chevron*, 404 U.S. at 106). In cases like *Scheiner* that involve the continued vitality of earlier rulings, this requirement has been described to mean that the decision must "overrul[e] clear past precedent on which litigants may have relied" (*ibid.*).[6] As the Court has explained, this " 'clear

[6] It is debatable whether *Scheiner* involves an overruling or simply a limitation of past precedent (see 107 S.Ct. at 2847), but we think that question should be of little moment to the present inquiry

break' principle * * * [is a] threshold test for determining whether or not a decision should be applied nonretroactively." *United States* v. *Johnson*, 457 U.S. 537, 550 n.12 (1981). Because the decision in *Scheiner* fails to satisfy this threshold test, it should be applied to require payment of the refunds at issue in this case.

The reliance element of *Chevron* is designed to identify those instances in which retroactive application of a new legal principle would upset strongly justified expectations, for only then might the normally overriding societal interest in applying the correct rule of law be outweighed.[7] As explained in *Lemon* v. *Kurtzman*, 411 U.S. 192, 198 (1973) (*"Lemon II"*), retroactivity analysis involves "[t]he process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old * * *." See also *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 (1970) (referring to the " 'justified reliance' necessary to warrant withholding retroactive application of a decision"); *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 498 n.13 (1968) (referring to "the sort of justifiable reliance which alone could generate a prospectivity argument").

In order to satisfy the threshold *Chevron* standard, therefore, the change in law must have been unexpected and unforeseeable. If a party reasonably could have anticipated the overruling of prior law, its reliance on those questionable precedents should not be considered

because it does not materially alter the "justifiable reliance" calculus.

[7] Whether the retroactivity issue involves the state's putative reliance upon old and questionable but not yet overruled cases or upon an arguably tenable but not yet adjudicated legal position, the fundamental inquiry is the same: does the ruling of unconstitutionality upset reasonable expectations based on legal principles upon which the state was entitled to rely when acting in a manner that might violate constitutional rights?

sufficiently justified to warrant protection under *Chevron*. It is only where a new rule entails surprise and thereby disrupts firmly established reliance interests that nonretroactivity should be considered. In particular, it is inappropriate to deny redress to a plaintiff who has suffered constitutional injury if there was a distinct prospect at the time the government acted that the old rule on which it claims reliance would be replaced. Any less demanding standard cannot possibly be squared with this Court's refusal in *Owen* v. *City of Independence*, *supra*, to allow governmental entities to assert a "good faith" defense to damages liability in constitutional cases.

To limit prospectivity to exceptional cases of strong reliance interests, the threshold *Chevron* standard requires a " 'clear break' " (*Johnson*, 457 U.S. at 550 n.12) with "clear past precedent" (*Chevron*, 404 U.S. at 106) on which a party was "entitled to rely" (*Saint Francis College*, 107 S.Ct. at 2025). This means that the overruling decision must

> announce an *entirely new and unanticipated rule of law*. In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law," *Milton v. Wainwright*, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting), unless that ruling caused "such an abrupt and fundamental switch in doctrine as to constitute an entirely new rule which in effect replaced an older one," *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 498 (1968).

Johnson, 457 U.S. at 551 (emphasis added).[8] Absent a change that "was quite unforeseeable" (*Chevron*, 404 U.S. at 108), the new decision must be applied retroactively.[9]

[8] See also *Hanover Shoe*, 392 U.S. at 499 ("[t]hese cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks"); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 488 (1986) (Stevens, J., concurring) (retroactivity is appropriate for any decision that was "presaged in * * * well-established precedent"); *id.* at 494 (Powell, J., dissenting) (retroactivity is not justified when "the decision had not been foreshadowed"). As one commentator has explained:

> [P]rospectivity [was developed] to ease the burden of an unexpected change of law on people who relied on the old rule. Therefore, a court should grant relief *only* when a court has made an "unexpected change of law." * * * [T]he threshold method ensures that a court will not prospectively apply a rule unless the court unexpectedly establishes a new rule of law.

Note, *Confusion in Federal Courts: Application of the* Chevron *Test in Retroactive-Prospective Decisions*, 1985 U. Ill. L. Rev. 117, 137 (emphasis in original).

[9] The lower courts have generally recognized this standard. See, *e.g.*, *Carter* v. *City of Chattanooga*, 850 F.2d 1119, 1123 (6th Cir. 1988) (en banc), pet. for cert. pending, No. 88-817 (filed Sept. 26, 1988) ("[t]he underlying concern expressed in [the retroactivity] cases is the inequity and harshness retroactive application of a new rule of law would impose on parties *who had no significant reason to doubt* the validity or constitutionality of a statute or practice" (emphasis added)); *I.A.M. Nat. Pension Fund* v. *Clinton Engines Corp.*, 825 F.2d 415, 424 (D.C. Cir. 1987) (the party seeking nonretroactivity must show that it "could not reasonably have been expected to have any inkling of the [new rule of] law"); *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819, 821 (1st Cir. 1984) ("[w]e do not agree that the [new decision] erupted from the Supreme Court firmament like a bolt out of the blue").

The Arkansas Supreme Court took precisely the opposite approach, however. It held that the State had a sufficient reliance interest to justify prospective application of *Scheiner* because "a reasonable person easily could have found [flat highway taxes] to pass Commerce Clause muster" (Pet. App. 4a) under the old *Aero Mayflower* line of cases. But it is not enough that the State in *Scheiner* (or here) had a reasonable argument for a different result, for "as between two surprised parties the burden of surprise should rest on the party who guessed wrong about the direction in which the law was moving" (*Vucitech*, 842 F.2d at 941). As the New

Jersey Supreme Court recently remarked in *Exxon Corp.* v. *Hunt*, 534 A.2d 1, 8 (1987) (emphasis added):

> The purpose of the *Chevron* test is the avoidance of prejudice arising from judicial decisions that interested parties could not fairly have anticipated. In this case the issue of statutory interpretation was *susceptible to either of two resolutions*, one advanced by the State and the other advanced by the plaintiffs. The [United States Supreme] Court's holding that CERCLA partially preempted the Spill Act was not sufficiently unpredictable to satisfy this aspect of the *Chevron* criteria.

As we now show, at the time Arkansas enacted the HUE tax in 1983, there were strong and unmistakable signals that the *Aero Mayflower* line of cases was open to very serious question and that discriminatory flat highway taxes would likely be held to violate the Commerce Clause. Accordingly, the State should not be permitted to avoid the usual legal obligation to return money unconstitutionally collected (see *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); *Ward* v. *Love County*, 253 U.S. 17 (1920)) by claiming justifiable reliance on a line of outmoded precedents.

2. *When the HUE tax was enacted in 1983, the continuing validity of* Aero Mayflower *was in grave doubt*

In holding that the State could justifiably have relied upon the *Aero Mayflower* line of cases when it enacted the HUE tax in 1983, the Arkansas Supreme Court gave no consideration to the validity of those precedents at that time. In fact, however, it is undeniable that they were of questionable validity by 1983 and were in grave danger of being rejected by this Court, as in fact happened in *Scheiner*. By 1983, this Court had fundamentally altered the governing Commerce Clause principles that had prevailed in the days of *Aero Mayflower*,

and it had expressly rejected a number of precedents that rested on the discredited precepts of that era. Had Arkansas given any consideration to the constitutionality of flat highway taxes when it enacted the HUE statute, it could not have failed to see that they presented serious problems under the Commerce Clause. In these circumstances, justice requires the State to bear the risk that its discriminatory action transgressed constitutional rights.

The shakiness of the State's reliance on *Aero Mayflower* is quickly shown by considering the chronology of relevant events. The *Aero Mayflower* line of decisions sustaining the validity of flat highway taxes dates to the period between 1935 and 1950. But flat highway taxes apparently fell into disuse soon thereafter; every flat tax statute mentioned in the *Scheiner* opinion (see 107 S.Ct. at 2841 n.17) was enacted during the 1980s. In the interim, during the period between 1977 and 1981, this Court decided a series of cases, including the seminal ruling in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and the subsequent decision in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), that announced the principles of modern Commerce Clause jurisprudence later relied on in *Scheiner* to invalidate taxes like the HUE tax. Despite the clear warnings that *Complete Auto* and *Commonwealth Edison* provided to state lawmakers, Arkansas chose to enact the HUE tax in 1983. Thus, in the face of recent major changes in this Court's Commerce Clause jurisprudence, the State elected to rely on cases decided nearly half a century earlier, upholding taxes that were obviously discriminatory in practical operation and that had fallen into desuetude for a generation. Against this background, there can be no serious claim of justifiable reliance on settled law.

The watershed in the Court's modern treatment of the Commerce Clause is the 1977 decision in *Complete Auto*.

On its face, the Court's unanimous opinion created a new set of rules to govern state taxation of interstate commerce, expressly overruling the much-cited case of *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951), and rejecting *Spector*'s reliance upon archaic methods of evaluating state taxes. Since then, this Court has often emphasized the importance of *Complete Auto* in modern Commerce Clause analysis,[10] and commentators likewise immediately recognized the seminal nature of the decision.[11] Indeed, in the very year that the Arkansas Legislature enacted the discriminatory HUE tax, the Arkansas Supreme Court recognized that

> in 1977 there was an abrupt change of course * * * [when *Complete Auto*] was decided, and a wholly different approach to state taxing jurisdiction resulted. * * * The court abandoned, as formalistic and impractical, prior standards applicable to challenges to state taxation on interstate commerce and laid down new guidelines for making an appropriate evaluation.

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[10] See, *e.g.*, *D.H. Holmes* v. *McNamara*, 108 S.Ct. 1619, 1623 (1988) (*Complete Auto* is the "leading case in the area"); *Washington Rev. Dep't* v. *Ass'n of Washington Stevedoring*, 435 U.S. 734, 749 (1978) (the Court's ruling "does not effect a significant present change in the law" because "[t]he primary alteration occurred in *Complete Auto*").

[11] See, *e.g.*, Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426, 1453 (1977) (*Complete Auto* "cleanly broke with the past"); Note, *State Taxation on the Privilege of Doing Interstate Business: Complete Auto Transit, Inc.* v. *Brady*, 19 B.C.L. Rev. 312, 327-328 (1978) (*Complete Auto* "establish[ed] a new conceptual framework"); Lockhart, *A Revolution in State Taxation of Commerce?*, 65 Minn. L. Rev. 1025, 1026 (1981) ("[t]he Supreme Court shook the foundations for the first time in 1977 with *Complete Auto*"); P. Hartman, *Federal Limitations on State and Local Taxation* § 2:17 at 89, § 8:6 at 448 (1981) (*Complete Auto* "relegated [prior cases] to the limbo of useless commerce clause doctrine" and represents an "epochal decision").

Burlington Northern R. Co. v. *Ragland*, 655 S.W.2d 437, 439 (Ark. 1983). And this Court, on the basis of its new analysis in *Complete Auto*, overturned a large number of antiquated Commerce Clause precedents,[12] "display[ing] * * * a remarkable willingness to discard earlier state tax decisions that do not reflect this approach." Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37, 70 (1987).[13]

The Court's decision in *Scheiner* makes it abundantly clear that the new Commerce Clause principles of *Complete Auto* and its progeny spelled the demise of the *Aero Mayflower* line of cases. Noting that flat highway taxes are "unquestionably discriminatory" (107 S.Ct. at 2847), the Court "f[ou]nd dispositive those of our prece-

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[12] See, *e.g.*, *Complete Auto*, *supra*, overruling *Spector*, *supra*; *Ass'n of Washington Stevedoring*, 435 U.S. at 743-750, overruling *Puget Sound Stevedoring Co.* v. *State Tax Comm'n*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947); *Hughes* v. *Oklahoma*, 441 U.S. 322, 326-336 (1979), overruling *Geer* v. *Connecticut*, 161 U.S. 519 (1896); *Commonwealth Edison*, 453 U.S. at 614-617, overruling *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); see also *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), overruling *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872) (Import-Export Clause); *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 657-668 (1981), overruling *Lincoln Nat'l Life Ins. Co.* v. *Read*, 325 U.S. 673 (1945) (Equal Protection Clause); *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 361 (1984), overruling *Hooven & Allison* v. *Evatt*, 324 U.S. 652 (1945) (Import-Export Clause).

[13] The impact of *Complete Auto* was perceived in the highway tax context as well. By 1983 several lower courts, applying the modern Commerce Clause principles enunciated in that decision, had recognized that highway taxes that produce substantially different costs per mile for in-state and out-of-state truckers constituted "manifest, severe, and unconstitutional * * * discrimination." *American Trucking Ass'ns, Inc.* v. *Conway*, 451 A.2d 42, 44 (Vt. 1982); see also *American Trucking Ass'ns, Inc.* v. *Quinn*, 437 A.2d 623, 626-627 & n.7 (Me. 1981); *American Trucking Ass'ns, Inc.* v. *O'Neill*, 522 F. Supp. 49, 56-57 (D. Conn. 1981).

dents which make it clear that the Commerce Clause prohibits a State from [discriminating against out-of-state taxpayers]" (*id.* at 2839). Recognizing that such discrimination "contradicts the central purpose of the Commerce Clause" (*ibid.*), the Court relied on *Complete Auto* and other cases dating back to 1977—six years before enactment of the Arkansas HUE tax—to establish that flat highway taxes are invalid "[u]nder our consistent course of decisions in recent years" (*id.* at 2841).

The State in *Scheiner* had "talismanically" invoked the *Aero Mayflower* cases to defend its flat taxes (107 S.Ct. at 2842), but the Court disposed of those decisions as relics of "the pre-*Spector* era" (*id.* at 2833). In particular, the Court explained that the *Aero Mayflower* decisions, like *Spector*, had rested on the rationale that a state could tax an interstate carrier for the "privilege" of using (rather than the actual use of) its highways (*id.* at 2845), a "metaphysical approach to the Commerce Clause" that "our more recent decisions * * * have rejected" (*id.* at 2846; citation omitted). *Complete Auto* therefore not only expressly overruled the *Spector* case itself "but also concluded that 'the philosophy underlying the [privilege] rule * * * [has] been rejected' " (*ibid.*; citation omitted). Accordingly, "i[n] ruling that the theoretical underpinning of this rule had been eroded we *necessarily called into question the future vitality* of [the *Aero Mayflower* cases that were] * * * premised on the [privilege] rule" (*ibid.*; emphasis added).

In addition to *Complete Auto*, the Court in *Scheiner* found that the *Aero Mayflower* cases also were inconsistent with the 1981 *Commonwealth Edison* decision. That case stated unequivocally that "the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact" with the taxing jurisdiction (453 U.S. at 626; emphasis in original). Hence, as the Court explained in *Scheiner*, *Commonwealth Edison* clearly

established that " 'when the measure of a tax bears no relationship to the taxpayers' presence * * * in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce' " (107 S.Ct. at 2844, quoting 453 U.S. at 629). While the severance tax at issue in *Commonwealth Edison* satisfied the "fair relation" requirement because it varied with the amount of coal extracted, the same plainly is not true of flat taxes. See *Commonwealth Edison*, 453 U.S. at 645 & n.10) (Blackmun, J., dissenting on other grounds) (the *Complete Auto* test requires that a state "impose a proportional rather than a flat tax rate" in order to ensure that the tax is "fairly related to the services . . . provided by the State"); see also *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 643 n.6 (1984) (the "fairly related" prong of *Complete Auto* recognizes that "an in-state [taxpayer] normally benefits to a greater extent from services provided by the State than does a transient [taxpayer]").[14]

Thus, in light of modern Commerce Clause principles that were "firmly established" (107 S.Ct. at 2846) no later than the *Commonwealth Edison* decision in 1981,

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[14] The Court in *Scheiner* also noted (107 S.Ct. at 2839 n.12, 2840-2841 nn.16, 21) that its decision was consistent with the invalidation of flat taxes in both pre- and post-*Aero Mayflower* cases such as *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489 (1887), and *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946). The Court had cited the *Nippert* line of cases with approval in several opinions handed down shortly before the HUE tax was enacted. See, *e.g.*, *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977); *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980). In addition, the *Scheiner* opinion pointed out (107 S.Ct. at 2841 nn.16, 20) that its decision accorded with academic commentary that had long criticized the *Aero Mayflower* reasoning. See, *e.g.*, Kauper, *State Taxation of Interstate Motor Carriers*, 32 Mich. L. Rev. 171, 203, 207 n.234, 211 (1933); Lockhart, *State Barriers to Interstate Trade*, 53 Harv. L. Rev. 1253, 1267, 1269 (1940); Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 232 (1957).

the Court in *Scheiner* concluded that the *Aero Mayflower* cases could "no longer suffice to uphold flat taxes with * * * blatantly discriminatory consequences" (*id.* at 2845). "The great constitutional purpose of the [Founding] Fathers cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding or discriminatory effect'" (*id.* at 2847; citation omitted).

Accordingly, were it not for the mere existence of *Aero Mayflower* on the books, any claim in 1983 that the HUE tax was supported by Commerce Clause precedent would have been wholly insubstantial. And the fact that the *Aero Mayflower* decisions had not yet been explicitly rejected did not by itself render it reasonable for the State to rely on them. The contrary reasoning of the Arkansas Supreme Court (Pet. App. 4a) reflects an unrealistic and unduly mechanical view of the judicial process. "[T]he mere fact that the Supreme Court renders a decision overruling prior law is insufficient to satisfy the first part of the *Chevron* test" unless there was *justifiable* reliance on the prior law. *Mineo* v. *Port Authority of New York & New Jersey*, 779 F.2d 939, 944-945 (3d Cir. 1985), cert. denied, 478 U.S. 1005 (1986).[15]

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[15] In this respect the State's reliance interest here is a far cry from that in *National Can Corp.* v. *Department of Revenue*, 749 P.2d 1286 (Wash.), appeal dism'd and cert. denied, 108 S.Ct. 2030 (1988). *National Can* presented the question of the retroactivity of *Tyler Pipe Indus. Inc.* v. *Washington Dept. of Revenue*, 107 S.Ct. 2810 (1987), which had invalidated a multiple activities exemption contained in Washington's business and occupation tax. That exemption had been enacted in 1950 and had been upheld by this Court (as well as by the Washington courts) on several occasions, including as recently as 1983, when the taxpayer's appeal in *Chicago Bridge & Iron Co.* v. *Washington Dept. of Revenue* was dismissed for want of a substantial federal question (464 U.S. 1013). In those circumstances, the reasonableness of Washington's enactment of the multiple activities exemption could not possibly be questioned, and the State accordingly had a strong claim of justifiable reliance on this Court's continued and recent decisions upholding its tax.

Often, a precedent may be eroded long before this Court has occasion to announce its formal demise. See, *e.g.*, *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 672 (1982); *Washington Rev. Dep't* v. *Ass'n of Washington Stevedoring*, 435 U.S. 734, 797 (1978) (overruling prior cases that rested "on a basis rejected by *Complete Auto*"). For example, a decision may be "moribund for * * * years before it [is] formally overruled" (*Johnson*, 457 U.S. at 560). Likewise, a decision may be open to substantial question if it "has been under attack from its inception * * *." *Roberts* v. *Russell*, 329 U.S. 293, 295 (1968). Or a new rule may simply be an "extension of doctrines which had been growing and developing over the years" (*Hanover Shoe*, 392 U.S. at 499). As Professor Moore has explained:

> [D]ecisions of courts of last resort not specifically overruled are not equally trustworthy. The law does not grow so much by checking off fact situations as decided, but by settlement of principles, and by the time the occasion arises to specifically overrule a particular case, its logical foundation may be so undercut by subsequent cases that it is plainly marked for destruction. * * * [R]eliance, to be justified, should take into account not merely any case on all fours, but the present state of the decision as shown by later cases.

1B *Moore's Federal Practice* ¶ 0.402 [3.-2-4] at 91-92 (2d ed. 1988).[16] These considerations are directly applicable here.

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[16] See also Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 947 (1962):

> [I]t will not do for a litigant to claim surprise in cases in which the overruled decision has long been eroded by cases which have all but explicitly overruled it. * * * [Such an unavailing claim] rests not so much upon unfairness resulting from surprise as it does upon unfairness resulting from the necessity of choice in an area in which there is less certainty than one, compelled to act, would wish. * * * [Nonretroactivity

In sum, while *Scheiner* may represent an incremental development in or clarification of Commerce Clause jurisprudence, it certainly does not embody an abrupt and unforeseeable break with clear past precedent. The Commerce Clause principles that proved fatal to the HUE tax have existed at least since *Complete Auto*, and the prospect that *Aero Mayflower* might be overruled should have been apparent to the State when it adopted the tax. The handwriting was on the wall when Arkansas enacted the HUE tax in 1983, but the State chose not to read it. Under *Chevron* (not to mention *Owen*) it is entirely proper for the legal system to require that the State assume the risk that its position, although not frivolous, would be held to lack merit.

This conclusion is not altered by the fact that this Court ultimately decided *Scheiner* by divided vote, or that a majority of the Arkansas Supreme Court had relied on *Aero Mayflower* in upholding the HUE tax prior to *Scheiner*. That reasonable judges could have determined that the old *Aero Mayflower* precedents should still be followed may mean that the issue was an arguable one, but it does not show that *Scheiner* represented an unforeseeable break with prior law.[17]

Since Arkansas cannot meet the threshold prospectivity requirement that *Scheiner* have established a new principle of law, that decision should be held fully retroactive

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would be inappropriate where a]ny good lawyer, asked about the reasonableness of reliance upon the aging precedent, would have counselled that reversal was at least a good possibility.

[17] Justice O'Connor's dissent in *Scheiner* explicitly acknowledged that flat highway use taxes can "pose a serious practical burden for interstate commerce" and that "as a matter of first impression the constitutionality of flat highway use taxes could have been resolved differently [than it had been in *Aero Mayflower*]" (107 S.Ct. at 2848). The dissent rested its unwillingness to invalidate the taxes on the ground that Congress rather than the Court was the more appropriate branch of government to reconsider the rule.

without regard to the other two *Chevron* factors. In any event, those factors—the purposes of the Commerce Clause and the equities of retroactive application—further support the retroactivity of *Scheiner*.

B. Retroactive Application Of *Scheiner* Will Further The Purposes Of The Commerce Clause

The second factor that must be considered under *Chevron* is whether retroactive application "will further or retard [the purpose behind] * * * the rule in question" (404 U.S. at 107) (citation omitted)—here, to counter the inherent tendency of states to discriminate against out-of-state taxpayers and thereby impair a national free trade market. Unlike the first *Chevron* factor, which focuses on the parties' reliance interests, the second factor looks to the broader societal interest in the application of the new—and correct—rule of law. Here, retroactivity will promote Commerce Clause values in two significant ways: remedying Commerce Clause injury; and deterring future violations of the free trade principle. See Tatarowicz, *Right to a Refund for Unstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Law. 103, 119, 141-142 (1987).

1. First, limiting *Scheiner* to prospective application would do nothing to remedy the unconstitutional discrimination against out-of-state taxpayers that has already occurred. The unfair burden that was placed on out-of-state truckers, and the resulting competitive benefit to Arkansas-based truckers, would go unredressed. Likewise, every tax dollar unlawfully exacted would remain in the State's coffers, so that the State would have succeeded for five years in shifting an unfair share of its tax burden to outsiders. These were, of course, the fundamental reasons that the Court in *Scheiner* held that flat highway taxes violate the Commerce Clause. We therefore see little cause to doubt that Commerce Clause

interests would be advanced by righting the competitive scales between in-state and out-of-state truckers.[18]

Indeed, this Court has held that the Fourteenth Amendment requires states to refund taxes exacted in violation of federal law. *Carpenter* v. *Shaw*, 280 U.S. at 369; *Ward v. Love County*, 253 U.S. at 24; see also *Iowa-Des Moines Nat. Bank.* v. *Bennett*, 284 U.S. 239, 247 (1931); *Atchison, T. & S.F.R.R.* v. *O'Connor*, 223 U.S. 280, 285 (1912); *United States* v. *State Tax Comm'n*, 645 F.2d 4, 5 (5th Cir.), cert. denied, 454 U.S. 896 (1981). With particular regard to the Commerce Clause, a federally-compelled refund remedy is necessary to return interstate commerce to "a plane of equality with local trade in local taxation." *Nippert* v. *City of Richmond*, 327 U.S. 416, 434 (1946). The refund remedy responds precisely to the evils caused by the discriminatory HUE tax, and nothing in the second *Chevron* factor supports the State's efforts to avoid the customary legal duty to return money unconstitutionally obtained.

2. Despite the foregoing considerations, the Arkansas Supreme Court found it "'difficult to understand how retroactive application would encourage free trade among

[18] In this respect as well, there are critical differences between the instant case and *National Can, supra*, on which the Arkansas Supreme Court relied (Pet. App. 4a). In *National Can*, the flaw in the tax was a hypothetical "risk" of multiple taxation arising from the failure to meet the requirement of internal consistency, and an acceptable cure was the provision of a credit for taxes paid to other states. See *Tyler Pipe*, 107 S.Ct. at 2820. But because few if any taxpayers were in fact subject to multiple taxation, there was no actual discrimination against interstate commerce. See *National Can*, 749 P.2d at 1292. A grant of refunds in that circumstance would actually have *created* a discrimination against in-state businesses that the Commerce Clause did not require. By contrast, in this case there is a "conceded" disparity of more than 3:1 in the tax burdens of in-state and out-of-state truckers (Pet. App. 2a, 11a); thus, petitioners undeniably suffered direct and substantial financial injury from the type of tax condemned in *Scheiner*.

the states since whatever chill was imposed on interstate trade is in the past'" (Pet. App. 4a, quoting *National Can*, 749 P.2d at 1291). This view that the Commerce Clause is indifferent to a state's retention of unconstitutional taxes ignores the above-mentioned considerations. But even accepting the implicit premise that the Commerce Clause exists only to prevent future interferences with interstate commerce, the court reached the wrong conclusion by failing to consider the deterrent effects of the refund remedy.

Decisions of this Court reviewing the validity of state taxes implement a core purpose of the Commerce Clause: to establish a national free trade market by protecting against the strong incentive that each state has to discriminate against out-of-state (and thus non-voting) taxpayers, thereby shifting the costs of local government to outsiders.[19] If the courts too readily permit states to retain unconstitutionally exacted taxes after a finding that the Commerce Clause has been violated, there will be little to counteract these parochial incentives.[20] As the

[19] See, *e.g.*, *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940) (discussing the "recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state"); *Nippert* v. *City of Richmond*, 327 U.S. at 434-435 ("Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against"); *United States* v. *County of Fresno*, 429 U.S. 452, 458-459 (1977); R. Posner, *Economic Analysis of Law* 602 (3d ed. 1986); L. Tribe, *American Constitutional Law* § 6-5 at 409-411, § 6-16 and 446, § 6-17 at 455-456 (2d ed. 1988).

[20] There is plainly a strong tendency on the part of state courts to permit retention of tax monies by limiting Commerce Clause tax decisions to prospective effect. See, *e.g.*, *Division of Alcoholic Beverages* v. *McKesson Corp.* 524 So.2d 1000 (Fla.), cert. granted, 109 S.Ct. 389 (1988) (consolidated with the present case in this

Court said in *Nippert*, 327 U.S. at 434, "[t]he problem comes down therefore to whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause."

Under the reasoning employed by the decision below, however, nonretroactivity of Commerce Clause cases would be the norm rather than the infrequent exception, because it could almost always be said that the chill on free trade is "in the past." If that were to occur, any impulse state legislators might have to enact constitutionally questionable taxes that favor in-state over out-of-state taxpayers would be reinforced by the knowledge that such preferences would be not only politically advantageous but economically cost-free. If a state were permitted to retain the benefits of a discriminatory tax, it would have little incentive to respect the requirements of the Commerce Clause by enacting a constitutional rather than an unconstitutional measure in the first instance.

Worse yet, even after a tax was held unconstitutional, it would still be tempting to adopt a slightly different but

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Court); *National Can, supra*; *Ashland Oil, Inc.* v. *Rose*, 350 S.E.2d 531 (W. Va. 1986), appeal dism'd for lack of jurisdiction, 107 S.Ct. 1949 (1987); *Salorio* v. *Glaser*, 461 A.2d 1100 (N.J.), cert. denied, 464 U.S. 993 (1983); see also Tatarowicz, *supra*, 41 Tax Law. at 117 & n.89 (collecting cases).

State courts also have relied on other grounds, such as sovereign immunity, in denying refunds of unconstitutional taxes. See *American Trucking Ass'ns, Inc.* v. *Conway*, 508 A.2d 408 (Vt. 1986), cert. denied, 107 S.Ct. 3262 (1987); *Continental Trailways, Inc.* v. *Director, Div. of Motor Vehicles*, 509 A.2d 769 (N.J. 1986), cert. dism'd per stipulation, 107 S.Ct. 1636 (1987); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 211 (Me.), cert. denied, 476 U.S. 1129 (1986). The validity of these rulings is questionable in light of cases such as *Carpenter* v. *Shaw*, *supra*, and *Ward* v. *Love County*, *supra*; see also *General Oil Co.* v. *Crain*, 209 U.S. 211, 226 (1908).

still discriminatory tax, thereby collecting the new tax payment with relative impunity during the several additional years it might take taxpayers to obtain a final judgment striking down the "revised" tax—which is precisely what Florida has done in the companion *McKesson* case (see No. 88-192 Pet. Br. 3-8). This cycle of constitutional violation followed by long, costly, futile litigation would effectively nullify the Commerce Clause's prohibition of discriminatory state taxes. Thus, the refund remedy is essential to deterring states from enacting—and reenacting—unconstitutional levies. See Tatarowicz, *supra*, 41 Tax Law. at 141-142.

This concern is not speculative or hypothetical: the trucking industry's own recent experience bears out the substantial risk to Commerce Clause policies. In this case, for example, there is no indication that Arkansas, when it enacted the HUE tax in 1983, paid the slightest attention to this Court's decisions in *Complete Auto* and other cases that established modern Commerce Clause principles. In fact, when the Arkansas Legislature repealed the HUE tax in October 1987 and replaced it with a 2.5¢ per mile weight-distance tax (1987 Ark. Acts 3 (2d Extr. Sess.)), it ignored a formal opinion of the State's own Attorney General that certain exemptions provided by the new law violated the federal Constitution.[21] The new law also contained a "grandfather" provision that extended the discrimination in the HUE tax for an additional year by treating payment of that flat tax as satisfying the 1987-88 weight-distance tax obligation, regardless of the number of miles operated by the taxpayer's trucks.[22]

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[21] That opinion is reproduced as an appendix to petitioners' reply brief at the petition stage.

[22] The situation in other states is similar. For instance, beginning in 1981, Vermont has passed a series of discriminatory truck taxes, putting new ones in place as rapidly as the old ones are struck down. In an attempt to stem this succession of unconstitutional

Such legislative actions reflect a disturbing indifference to—if not outright disregard of—Commerce Clause requirements and confirm the strong propensity of states to discriminate against out-of-state taxpayers. These tendencies would be encouraged if the Commerce Clause decisions of this Court were not given retroactive effect.[23] Under the ruling of the Arkansas Supreme Court, state legislators are free to engage in a virtual shell game by repeatedly enacting discriminatory taxes, thereby requiring out-of-state taxpayers to pursue lengthy and expensive litigation that leads only to prospective relief.

To protect the fundamental policies of the Commerce Clause, a different incentive structure is plainly necessary. In *Owen* v. *City of Independence*, 445 U.S. at 651-652, the Court noted that monetary relief "serve[s]

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exactions, ATA has brought four separate lawsuits over eight years —and the end still is not in sight. See *American Trucking Ass'ns, Inc.* v. *Conway*, 508 A.2d 405 and 408 (Vt. 1986), cert. denied, 107 S.Ct. 3262 (1987) (striking down facially discriminatory highway tax schemes enacted in 1981 and 1982, but denying refunds on sovereign immunity grounds); *American Trucking Ass'ns, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-306 (Vt. Super. Ct., Washington Co., Feb. 11, 1988) (ordering refunds of escrowed unconstitutional flat highway tax, enacted in 1986 to replace tax scheme previously struck down), notice of appeal filed, No. 88-156 (Vt. Mar. 11, 1988); *American Trucking Ass'ns, Inc.* v. *Conway*, [Vt.] St. Tax Rep. (CCH) ¶ 200-287 (Vt. Super. Ct., Washington Co., May 4, 1987) (ordering refunds of escrowed unconstitutional retaliatory highway tax), notice of appeal filed, No. 87-300 (Vt. June 3, 1987).

[23] One state supreme court justice has recently written about the pressures on state courts and state legislators to favor local parties and interests over out-of-staters. R. Neely, *The Product Liability Mess* (1988). With specific reference to taxation of commerce, Justice Neely writes that "revenue-hungry states persistently devise new schemes to test the frontiers of old interstate tax laws" (*id.* at 73) and that this Court's efforts to control taxation of interstate commerce play a vital role in counterbalancing the parochial pressures that otherwise tend to dominate state court decision-making (*id.* at 75).

as a deterrent against future constitutional deprivations" and provides an "incentive" for government officials "to err on the side of" complying with the Constitution. "Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury" (*id.* at 656). Were nonretroactivity to become the general rule, the government officials "would have little incentive to err on the side of constitutional behavior" and would be " 'encourage[d] * * * to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach' " (*Johnson*, 457 U.S. at 561 (citation omitted)). Accordingly, retroactivity is necessary to encourage state officials to heed the national interests in interstate free trade instead of provincial local concerns that favor in-state over out-of-state taxpayers.

C. The Balance Of Equities Strongly Favors The Retroactivity Of *Scheiner*

The final *Chevron* factor is whether retroactive application would produce "substantial inequitable results" (404 U.S. at 107 (citation omitted)). We note preliminarily that the State's claims of hardship must be assessed in light of the weakness of its reliance interest on pre-*Scheiner* law. As discussed in connection with the first-prong inquiry (pages 14-27, *supra*), this is a case in which, at best, the state of the law was highly uncertain when the discriminatory HUE tax was enacted. As the Court said in discussing the equity prong of the *Chevron* analysis in *Goodman* v. *Lukens Steel Co.*, 107 S.Ct. 2617, 2622 (1987), retroactive application of a new rule "will not * * * result in inequity to [a party who is] charged with knowledge that [the selection of the correct rule] was an unsettled question." Thus, even where the consequences of retroactivity are severe, as with the shortened statute of limitations in *Goodman*, there can be no sub-

stantial inequity in requiring a party to bear the risks it voluntarily assumed by adopting a legally perilous course of action.

Even putting aside the weakness of its reliance interest, Arkansas cannot meet its burden of showing "substantial" inequity from retroactive application of *Scheiner*. To the contrary, this factor weighs strongly in petitioners' favor in view of the lack of any demonstrated harm to the State and the severe economic injury that petitioners suffered from the discrimination inherent in the HUE tax.

"Elemental notions of fairness dictate that one who causes a loss should bear the loss" (*Owen* v. *City of Independence*, 445 U.S. at 654). In *Owen* the court rejected the city's argument that "revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers," explaining that "[i]t hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby" (*ibid.*). Thus, "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated" (*id.* at 655).

This analysis is especially apt with respect to the retroactivity of Commerce Clause decisions. As discussed above (see page 28, *supra*), retroactivity would require the discriminating state to do nothing more than return the taxes it unconstitutionally collected. See *Bradley* v. *City of Richmond*, 416 U.S. 696, 720 (1974) (retroactive application of a new statute is not unjust, because "[t]hese funds were essentially held in trust for the public"). Furthermore, by bringing suit in this case and

Scheiner to set aside discriminatory state taxes, petitioners served not only their own private interest but also the broader public interest in a national marketplace free of the economic dislocations and Balkanization of commerce that, as the Court has recognized (see *Scheiner*, 107 S.Ct. at 2841; *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 406 (1984)), such discrimination can produce. See *Bradley*, 416 U.S. at 718.

The decision below utterly fails to justify the fundamental unfairness of denying retroactive application of *Scheiner* in order to withhold refunds of taxes unconstitutionally exacted. In giving *Scheiner* prospective-only effect, the Arkansas Supreme Court relied on two factors (Pet. App. 4a-5a): first, that the taxes had "already [been] paid into the state treasury" and spent on highway construction and repair; and second, that award of a full refund would afford petitioners "an unconscionable windfall" because it would exceed the amount of any discriminatory injury they suffered from the tax and because they benefited from the use of the State's highways during the years in question. Both of these rationales represent a basic misconception of the "substantial inequity" factor. The Arkansas court's approach, if adopted by this Court, would result in the routine denial of monetary restitution to victims of unconstitutional taxation.

1. *The State can show at most inconvenience from refunding already expended HUE taxes, not any burden that would make a refund inequitable*

Notwithstanding the Arkansas Supreme Court's unexplained assertion, it is far from clear why the fact that the unconstitutional tax proceeds have been "spent" or "counted on for the future" (Pet. App. 5a) should defeat retroactivity. Surely the fact that an unconstitutional fine or civil penalty had been spent by the state

while its validity was being litigated would never justify a refusal to refund it. No reason is suggested why taxes should be different, especially when the defect in the tax is actual, unlawful discrimination that causes a disfavored class of taxpayers to pay more than its share while a favored group pays less.

The Arkansas Supreme Court's emphasis on the payment of the HUE tax into the state treasury was particularly misplaced in the circumstances presented here. At the time this suit was brought—and before any HUE tax revenues had been collected or expended—petitioners sought interim injunctive relief for the precise purpose of forestalling such reasoning if the tax were ultimately invalidated. This preliminary relief was denied by the Arkansas Supreme Court in part on the ground that no irreparable harm would result to petitioners from permitting the State to go forward with collection of the tax (Pet. App. 40a-41a). It was hardly "equitable" for that court later to switch course and hold that petitioners' injuries cannot be remedied because the State had spent the HUE monies. Given petitioners' request for relief *pendente lite*, Arkansas cannot claim any substantial equity based on its receipt and expenditure of the HUE tax proceeds. See, *e.g.*, *Lemon II*, 411 U.S. at 196-197, 204-205.

In any event, assuming that refunding the ill-gotten tax revenues would be inconvenient or even burdensome for the State—and the court below did *not* make such a finding—that hardly establishes that requiring refunds would produce inequitable results, let alone such " 'substantial inequitable results' " as would entail " 'injustice or hardship' " (*Chevron*, 404 U.S. at 107). We question whether the duty to refund illegal taxes can ever be properly classified as inequitable. But whether or not that is so, it is clear that the retroactive application of *Scheiner* would not produce substantial inequitable results.

Contrary to the Arkansas Supreme Court's apparent assumption, the potential inequity to a state from a tax refund cannot be assessed merely on the basis that the tax proceeds have been expended. Rather, it is essential to weigh a variety of other factors as well—such as the amount of the requested refund, the means available for ameliorating the impact of the refund and for raising the necessary monies, and the state's overall financial situation. If it is possible to mitigate the dislocations that might arise from a judgment ordering payment of refunds, it is difficult to understand how such a payment could amount to substantial hardship.

A number of means are available here to cushion the impact of the State's duty to repay the HUE tax. To begin with, it is important to recognize that the HUE tax was a user fee rather than a general revenue measure. Maintenance of the State's highways—an objective that out-of-state truckers desire no less than in-state truckers—can be fully funded by other, nondiscriminatory highway taxes imposed on all truckers, including petitioners, in fair proportion to the wear and tear they actually cause to the State's roads. See *Scheiner*, 107 S.Ct. at 2847 & n.27. Thus, not one cent of the refunds need come from the state treasury or the pockets of general revenue taxpayers; rather, the refunds can be financed by new tax levies, fairly shared by in-state and out-of-state truckers. The State would merely serve as a conduit for rectifying the past discrimination.

Other measures also could be employed to avoid serious dislocations. For example, in the remand proceeding in this case the Arkansas Supreme Court ignored our offer (see ATA's Reply Brief in the Ark. Sup. Ct. (No. 85-101), at 16) to accept refunds paid in installments over a reasonable period of time.[24] Nor was any consideration

[24] That brief expressed (at 14-16) petitioners' continuing willingness to work cooperatively with the State to devise a fair and flexible refund methodology that would minimize any possible disruption to the Arkansas highway program.

given to the possibility of issuing bonds that could be financed by future highway tax revenues; that would allow refunds to be paid immediately, but would spread the cost over the life of the bonds and ultimately recoup the expense from highway users. See Tatarowicz, *supra*, 41 Tax Law. at 143. In light of these reasonable alternatives, the fact that the proceeds from the unconstitutional HUE tax have been paid into the state treasury does not present a substantial inequity that would justify non-retroactive application of *Scheiner*.[25]

2. *The retroactive application of* Scheiner *would not produce a "windfall" for petitioners*

The second "equitable" reason advanced by the Arkansas Supreme Court—that a full refund of the HUE tax would confer a "windfall" on petitioners "far in excess of a fair recovery for the discrimination they may have suffered due to the tax" (Pet. App. 5a)—is equally misguided. At the outset, it should be noted that petitioners simply invoked the refund remedy provided by Arkansas law for an illegally exacted tax. See *City of Little Rock* v. *Cash*, 644 S.W.2d 229, 237 (Ark. 1982), cert. denied, 462 U.S. 1111 (1983); *Streight* v. *Ragland*, 655 S.W.2d 459, 461 n.6 (Ark. 1983). It was not petitioners' position in the Arkansas Supreme Court—and it is not here—that federal law requires more than a refund of such amount as is necessary to undo the unconstitutional discrimination that petitioners suffered on account of the HUE tax. To the extent full refunds would result in a "windfall," that result is a feature of state law and cannot be laid at petitioners' door. Certainly, the court's expressed concern that petitioners not

[25] The contrast is striking between this case and *Chevron*, where the plaintiff would irretrievably have lost his claims if the new rule shortening the statute of limitations had been applied retroactively.

receive an *excessive* refund provides no justification for the complete denial of *any* refund at all.[26]

The denial of *all* relief because of the possibility that a full refund would include a windfall component is particularly unwarranted in the circumstances of this case. As Justice Blackmun noted in granting the escrow, the out-of-state truckers paid more than three times as much tax per mile as the Arkansas-based truckers did (Pet. App. 11a). Accordingly, the "discrimination component" of the HUE tax payments represented more than two-thirds of the total, and full refunds would not greatly exceed the amount of actual injury. This situation is thus wholly unlike that in *National Can*, upon which the Arkansas Supreme Court relied, since the taxpayers in that case could invoke little more than a theoretical risk of discrimination. See note 18, *supra*. The premise of the court below—that a full refund would entail an "unconscionable" windfall "far in excess" of the actual discrimination—is simply unfounded.

For much the same reasons, the suggestion that it would be inequitable to make any refunds because petitioners have benefited from the ability to use the State's highway is untenable. The problem with the HUE tax was that it forced petitioners to pay far more than their fair share for the use of the highways—*i.e.*, it required them also to pay a large part of the in-state truckers' share as well. To refuse petitioners any refund of the discriminatory portion of their tax payments on the

[26] In response to the Arkansas Supreme Court's reasoning, petitioners urged—to no avail—that the court "should exercise its inherent equitable power to make an appropriate *"pro-rata* reduction in * * * refunds" by limiting such refunds "to the amount by which [out-of-state truckers'] tax liability [an average of more than 3.2¢ per mile] exceeded 1¢ per mile [the average tax liability of in-state truckers]" (Appellants' Reh. Pet. 7-8). In this way out-of-state taxpayers would be charged their fair share, but no more, for their "use[] [of] Arkansas highways" (Pet. App. 4a).

ground that they used the highways makes no more sense than saying that if the University of Arkansas charged women three times as much as men to attend its football games, the women would have no equitable claim for a refund because they were allowed to see the game.

D. Other Considerations Also Counsel Against Non-retroactivity In The Tax Refund Context

In addition to its error on the merits of the *Chevron* analysis, the Arkansas Supreme Court's reasoning raises the prospect of increased judicial intrusion into state taxing systems. Insofar as payment of unconstitutional taxes into a state treasury weighs against retroactivity, courts will be more likely to award preliminary injunctive relief restraining the collection or at least the expenditure of the tax, in order to preserve a refund remedy if the taxpayer prevails. See *Ohio Oil Co.* v. *Conway*, 279 U.S. 813 (1929). In fact, Justice Blackmun entered just such an injunction in this case (though too late to protect most of petitioners' tax payments), finding "a likelihood that irreparable injury will result if relief is not granted" (Pet. App. 11a). Furthermore, absent a refund remedy, state law might not provide a "plain, speedy and efficient remedy" for claims that state taxes violate federal law, thus freeing federal courts from the constraint of the Tax Injunction Act, 28 U.S.C. § 1341.

These consequences could prove more injurious to the states than the requirement to refund unconstitutional taxes that were of dubious validity when enacted. Injunctions or even escrow orders could leave revenue needs unmet and might thereby force a state's abandonment of a challenged tax whose constitutionality might ultimately have been sustained.

II. EVEN IF *SCHEINER* IS NOT RETROACTIVE, PETITIONERS ARE ENTITLED TO REFUNDS OF PAYMENTS MADE FOR HIGHWAY USE DURING THE TAX YEAR THAT BEGAN AFTER *SCHEINER* WAS DECIDED

If, contrary to the foregoing, the Court concludes that *Scheiner* is not retroactive, the question remains of the proper prospective application of that decision. This, in turn, raises two issues: (1) Was the State obliged to honor the *Scheiner* rule once it was announced by this Court on June 23, 1987, or, as the Arkansas Supreme Court held (Pet. App. 5a), did its obligation to obey the correct constitutional principles run only from the date of Justice Blackmun's interim escrow order (August 14, 1987) specifically applying the principles of *Scheiner* to the HUE tax? (2) Assuming the HUE tax could no longer lawfully be enforced once *Scheiner* was decided, does petitioners' right to a refund relate only to taxes *paid* after that date, or does it cover any HUE tax payment, whenever made, for the privilege of using Arkansas' highways during the post-*Scheiner* tax year? As we now show, Arkansas could not exact the HUE tax for highway use after June 23, 1987, and must refund taxes paid for the post-*Scheiner* period regardless of the date they were actually remitted.

A. *Scheiner* Invalidated The HUE Tax From The Date It Was Decided

By the decision below, the Arkansas Supreme Court suspended the effectiveness of this Court's Commerce Clause holding in *Scheiner* from the date that decision was issued until the time, nearly eight weeks later, that Justice Blackmun entered an interim injunction. Because Arkansas' HUE tax year ran from July to June, this delay had the highly injurious effect of allowing the State to collect virtually a year's worth of additional

discriminatory taxes.[27] There can be no justification—and the Arkansas court offered none—for this refusal to apply *Scheiner* with respect to the State's efforts to exact the unconstitutional HUE tax for the tax year that did not even *begin* until after the date of the *Scheiner* decision. See *American Trucking Ass'ns, Inc.* v. *Goldstein*, 541 A.2d 955 (Md. 1988).

1. It is beyond serious dispute that *Scheiner* doomed the HUE tax, which was materially indistinguishable from the Pennsylvania axle tax invalidated in that case. Pennsylvania's tax was assessed at a rate of 9¢ per mile up to a maximum flat rate of $180 (2,000 miles); Arkansas' HUE tax rate was 5¢ per mile up to a maximum flat rate of $175 (3,500 miles). Both taxes violated the internal consistency principle that was at the heart of the *Scheiner* decision, since their replication by other states would inevitably cause interstate truckers to suffer far heavier tax burdens for the same level of highway use than would be experienced by truckers who operated largely or exclusively within a single state. Moreover, both taxes were shown to have actual discriminatory impacts, costing typical out-of-state truckers many times as much per mile of operation within the State as they cost in-state truckers.[28] And both the State

[27] While the tax year begins July 1, truckers are given until September 1 to display decals on their vehicles evidencing payment of the tax, so that substantial payments are made in June, July, and August. On the other hand, except for vehicles newly placed in service, few payments would be received by the State from September until May or June, when vehicles begin to be requalified for the coming tax year. Because of this timing, it seems probable that most of the tax payments for the 1987-88 tax year would have been made prior to establishment of the escrow.

[28] Compare 107 S.Ct. at 2841 (Pennsylvania taxes discriminate in actual operation) with Pet. App. 2a (Arkansas Supreme Court's statement that "[i]t is conceded that the HUE tax effectively costs other truckers more per mile than it costs those based in Arkansas") and Pet. App. 11a (Justice Blackmun's recognition that "the HUE tax is substantially similar to * * * the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*" and "exposes trucks that engage in extensive interstate operations to a cumulative tax burden * * *. The tax thus works to deter interstate commerce").

of Arkansas in its *amicus* brief on the merits in *Scheiner* (at i, 1, 14, 17-18), and the dissenting opinions in that case (107 S.Ct. at 2849 (O'Connor, J.), 2851 (Scalia, J.); see also *Tyler Pipe*, 107 S.Ct. at 2824-2826 (Scalia, J., dissenting)), recognized that all flat highway taxes, including specifically the Arkansas HUE tax, would be invalid under *Scheiner*.

Despite the clear invalidity of the HUE tax under the Commerce Clause principles applied in *Scheiner*, the Arkansas Supreme Court apparently believed that it was not necessary to give those principles effect in Arkansas until some court or judge had actually applied them to the HUE tax itself. The history of this litigation is the best possible proof of the utter unacceptability of this approach.

Rather than bowing to the obvious implications of *Scheiner* for the HUE tax, the State dug in its heels and sought to continue exacting the tax for as long as the courts would tolerate. As recounted in Justice Blackmun's escrow ruling, the State announced that it would keep collecting the HUE tax during the post-*Scheiner* tax year, while the proceedings on remand from this Court went forward in the state courts, and would bar trucks that failed to pay the unconstitutional tax from using the State's highways. When truckers attempted to pay the HUE tax under protest, in order not to prejudice their refund claims, the State refused to accept their tax payments. And the State declared that, even if the HUE tax collections for the post-*Scheiner* period were held to violate the Commerce Clause, it would assert state sovereign immunity to bar any refunds. See Pet. App. 12a.

The remand proceedings were of a similar character. At the outset, the State opposed petitioners' request for immediate issuance of the mandate from this Court, which Justice Blackmun nonetheless granted. See Pet. App. 10a. The State then opposed petitioners' motion in the Arkansas Supreme Court to remand the case to the Chancery Court for consideration of a preliminary injunction, which motion was prompted by the state supreme court's impending summer recess; the court denied the motion (Pet. App. 15a). The State also successfully opposed petitioners' subsequent motion that the Arkansas Supreme Court itself enter an interim escrow order, and that motion too was denied (*id.* at 14a). In the face of the State's obduracy, petitioners were forced to seek interim relief from Justice Blackmun in his capacity as Circuit Justice. Once again, the State opposed petitioners' request, this time unsuccessfully.[20]

2. It is against this background that the Arkansas Supreme Court's decision must be viewed. Although acknowledging in its March 1988 opinion that *Scheiner* itself left "little doubt that the Supreme Court would hold that the HUE tax is unconstitutional" (Pet. App. 3a), and notwithstanding the deliberate effort of State officials to extend the enforcement of the plainly invalid HUE tax as long as possible, the Arkansas Supreme Court permitted the State to retain the bulk of the unconstitutional taxes collected for the post-*Scheiner* tax year, granting refunds only of the considerably smaller amounts

[20] Arkansas' determination to persist for as long as possible with its highway tax discrimination against out-of-state vehicles has not been confined to the executive and judicial branches. When Arkansas enacted its 2.5¢ per mile replacement tax, it exempted for the first year those who had paid the HUE tax. See page 31, *supra*. As a consequence, high-mileage users of the State's highways (mostly Arkansas-based operators) retained the benefit of the flat tax, and the discrimination against less frequent users (mostly non-Arkansas-based operators) was perpetuated for another year. By itself, this is a clear and independent violation of *Scheiner*.

that were paid after Justice Blackmun's escrow order of August 14. See page 41, *supra*. That date was said to mark the first time that the State was "put on notice" that petitioners' claims "were likely to succeed on their merits" (Pet. App. 5a).

Under this reasoning, it seems quite evident that, had Justice Blackmun not issued an escrow order, the Arkansas Supreme Court would have allowed the State to retain all taxes collected until the date, seven months later, that it finally got around to rendering its own opinion applying *Scheiner* to the HUE tax—a process whose outcome, as the Arkansas Supreme Court candidly acknowledged, was a foregone conclusion. The effective date of a decision of this Court cannot, however, be made to depend upon the pace set by a state court in remand proceedings or the happenstance of the entry of an exceptional injunctive order by a Circuit Justice.

By permitting the State to exact and retain the clearly unconstitutional HUE tax for the year *after* the decision in *Scheiner*, the Arkansas Supreme Court's ruling amounts to nothing less than a refusal to give full *prospective* effect to this Court's holding. This was recognized by Justice Hickman in dissent below (Pet. App. 5a). Nothing in *Chevron* justifies the lower court's circumvention of *Scheiner*.

It is well settled that a new principle of law, even if held to be nonretroactive, is effective on the date that the decision announcing it was handed down. See *Shea* v. *Louisiana*, 470 U.S. 51, 55 n.3, 57 (1985); *id.* at 61 (White, J., dissenting); *Johnson*, 457 U.S. at 542-543; *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 214 (1970). In the case of the prohibition of flat highway taxes, that date was June 23, 1987. If a tax is invalid under *Scheiner*, there is simply no basis for allowing it to be collected and retained from June 23, 1987 forward, at least

with respect to a tax year not beginning until after that date.

As discussed more fully in Section I, the threshold requirement of the *Chevron* test for nonretroactivity is that the decision in question embody a new principle of law. The opinion of the Arkansas Supreme Court might be read to suggest that the date of Justice Blackmun's escrow order is the appropriate one for nonretroactivity purposes because it was not until his accompanying opinion that the State was "put on notice" that the HUE tax was likely to be held invalid. If this was the court's meaning, it is wholly untenable. The fate of the HUE tax was unmistakably sealed by the *Scheiner* decision (see pages 42-43, *supra*), and Justice Blackmun's opinion certainly gives no suggestion that he believed he was announcing a new legal rule. Indeed, the Arkansas Supreme Court did not even cite to Justice Blackmun's order in the portion of its opinion addressing the constitutionality of the HUE tax (Pet. App. 2a-3a).

The Arkansas Supreme Court's approach represents an egregious violation of the principle that the decisions of this Court must be followed by the courts of the states. That court had "little doubt" (Pet. App. 3a) that, under the principles of *Scheiner*, this Court would hold the HUE tax unconstitutional. That being so, it was entirely improper for it to countenance the State's continued post-*Scheiner* enforcement of that tax and retention of the sums unlawfully exacted. There is simply no room in our judicial system for a state to refuse to give immediate effect to the constitutional rulings of this Court.

B. Payments Relating To The Post-*Scheiner* Tax Year Must Be Refunded Regardless Of When They Were Made

Because *Scheiner* was decided so near the end of Arkansas' 1986-87 tax year, there is no controversy regarding payments made for that year. If *Scheiner* is retroactive, they should be refunded; if it is not, they

need not be. But payments for the post-*Scheiner* 1987-88 tax year stand on a different footing. A significant portion of those payments was remitted to the State prior to the date *Scheiner* was handed down. Assuming, as argued above, that the State could not continue to enforce the tax after June 23, 1987, a question remains regarding these pre-June 23 payments.

It is our submission that what must antedate the rendition of a nonretroactive Commerce Clause tax ruling in order for the state to retain the monies is the occurrence of the taxed transaction or the enjoyment of the taxed benefit, not the remittance of the tax. Under the HUE statute, the transaction being taxed was the use of the State's highways. See Ark. Stat. Ann. § 75-817.3(b) (Supp. 1985) ("[a] tax is hereby imposed upon all users * * * in compensation for the use of the highways of this State"), amended in other respects, 1987 Ark. Acts 3 (2d Extr. Sess.). Given the nature of the HUE tax, it would be inconsistent with the prospective application of *Scheiner* to permit the State to retain payments made for the privilege of operating vehicles after July 1, 1987, simply because the payments happened to have been remitted before June 23.

Both this Court and lower courts have recognized that the division between prospectivity and retroactivity depends upon the occurrence of the operative event for the particular transaction at issue. In *Lemon II*, for example, the Court allowed reimbursement to be made after the date of *Lemon I* (*Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)) for services performed prior to *Lemon I*. In so ruling the Court focused on the "patterns of conduct" involved (411 U.S. at 198) and the effect on the "constitutional interests at stake in *Lemon I*" (*id.* at 201). Under that approach, the Court concluded that the occurrence of the underlying transaction, and not the payment of money therefor, was the critical event for prospectivity purposes.

Likewise, in *American Trucking Ass'ns, Inc.* v. *Goldstein, supra,* a case involving flat highway taxes in the wake of *Scheiner,* the Maryland Court of Appeals recognized that a prospective-only decision is applicable to "*operative events* occurring after the date of the decision" (541 A.2d at 959 (emphasis added)). Furthermore, "[f]or purposes of a decision invalidating a tax statute, the operative event * * * is the actual imposition of tax liability" (*ibid*). Accordingly, the court held that *Scheiner* precluded post-*Scheiner* enforcement of an unconstitutional tax even though prior to *Scheiner* the state had anticipated and relied on the receipt of those funds.

The rule we espouse does not necessarily favor the taxpayer over the taxing authority. In the case of transactional taxes, the effect is likely to be the opposite of what it is here, as shown by *Ashland Oil, Inc.* v. *Rose,* 350 S.E.2d 531, 536-537 & n.8 (W.Va. 1986), appeal dism'd for lack of jurisdiction, 107 S.Ct. 1949 (1987). That case involved the retroactivity of *Armco, supra,* which had invalidated a credit provided in the West Virginia wholesaling tax for amounts paid under its manufacturing tax. Ashland had not paid taxes for which its liability accrued prior to the date of the *Armco* decision, and the State had sued to recover those taxes. The West Virginia Supreme Court held (correctly in our view) that the critical date was the one on which the liability accrued (*i.e.*, the taxable sale was made).

As in the above cases, the critical event here is the occurrence of the substantive transaction at issue—the taxable use of Arkansas' highways—not the payment of money that is owed because of the underlying transaction. The opposite result would unfairly discriminate among similarly situated taxpayers on the basis of a completely fortuitous event. Thus, even if *Scheiner* is nonretroactive, it must be applied to taxes imposed for out-of-state

truckers' use of the State's roads after the effective date of this Court's decision.[30]

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted.

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[30] Even if August 14, 1987, when the escrow order issued, were the effective date of invalidation of the HUE tax, it would not follow that the State should be permitted to retain all amounts collected prior to that date. If we are correct that it is the enjoyment of the privilege and not the payment of the tax that is crucial, then Arkansas may not retain more than 5¢ per mile for miles operated between July 1 and August 14. Since the tax payments were made on the basis of the mileage estimated for a full year, many taxpayers would be entitled to significant refunds even under the effective date selected by the Arkansas Supreme Court.